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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-808

ANTHONY M. NATELLI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Government filed its Brief in Opposition to the petition for certiorari on April 9, 1976.[1] Petitioner submits this brief to reply to the government, to discuss the impact on his case of this Court's recent decision in *Ernst & Ernst v. Hochfelder*, ____ U.S. ____ (No. 74-1042, March 30, 1976) and to bring to this Court's attention a recent *en banc* decision of the Court of Appeals for the Ninth Circuit having an important bearing upon petitioner's point II. Petitioner's argument

[1] As noted in the government's brief, the government has filed a second petition for rehearing of the decision by the court of appeals to reverse the conviction of petitioner's codefendant. That pending rehearing petition refers to this prosecution as an "important case" that has attracted public attention.

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is organized under the five points presented in the petition for certiorari.[2]

We also emphasize at the outset that the American Institute of Certified Public Accountants (AICPA) and Peat, Marwick, Mitchell & Co. (PMM), one of the largest international firms of certified public accountants, have filed *amicus curiae* briefs urging the grant of certiorari because of the general importance of the issues raised by this case to the accounting profession.

[2] The government's statement of the facts relies heavily upon the opinion below. We have already noted in the petition the instances in which the court below departed from what the jury could fairly have found. (Pet. 5, 7 n.3, 10 n.5, 14 n.7, 18 n.9). Since the petition contains a detailed statement fairly presenting the facts developed at trial, we will not attempt to respond to each characterization of the facts in the government's brief that we consider erroneous or misleading, except as these bear significantly on the argument. *See, e.g.*, on the Eastern commitment, point V, *infra*.

We do note, however, two egregious statements made by the government about the footnote to the audited financial statements. The government implies that petitioner struck from an original draft of the footnote a narrative disclosure of contract write-offs drafted by someone else. (Br. in Opp., p. 7). The record shows, however, that it was petitioner himself who drafted the disclosure and he took it out only after discussing the matter with a PMM SEC reviewing partner who agreed that such disclosure was unnecessary. (Pet. 13-14).

Equally misleading is the government's characterization of the netting of contract write-offs and a tax credit as an "unorthodox procedure." (Br. in Opp., pp. 6-7 n.5.) In fact, the tax credit was shown separately in the financial statement printed in the proxy materials and was netted with the contract write-off only on NSMC's books, not in any public documents. This is a procedure used by professional accountants in entering off-setting items on a company's books (Tr. 665) and, of course, the use of the procedure was fully known in this case to the company's accountants and officers responsible for financial records.

I.

THE DECISION BELOW OBLITERATES THE ACCEPTED DISTINCTION BETWEEN AUDITED AND UNAUDITED STATEMENTS.

A. We argued in the Petition (Pet. 25-29) that this Court should review the determination by the court of appeals that an accountant may suffer criminal liability for failure to confirm unaudited figures, even though authoritative professional standards now adopted by SEC Accounting Rule 2-02(e) do not require confirmation or any other auditing procedures when an accountant is merely associated with an *unaudited* statement. Petitioner specifically requested an instruction making clear than an accountant's obligations regarding unaudited statements with which he becomes associated are far more limited than those he assumes when he renders an auditor's report.[3] Although the judge charged the jury on the responsibilities of an auditor, the language petitioner requested was not given. The court of appeals held that petitioner's request "was not correct" because the auditor's duty was "not so different" from that of an accountant associated with unaudited statements the court believed "suspicious." (Pet. App. 23a-24a).

[3]Petitioner's request included the following language:

> As to the unaudited statement of earnings for the nine months ended May 31, 1969, the defendants had no responsibility to render an opinion that the statement fairly presented the results of the client's operations. The defendants' only responsibility as to this statement was to be satisfied that, as far as they knew, the statement contained no misstatement of material facts.

The government contends that "[p]etitioner does not challenge [the court of appeals'] holding, nor does he even now suggest what a proper instruction would have been." (Br. in Opp. p. 11). The government has misstated petitioner's position and overlooked the requests made by petitioner's counsel.

The substance of petitioner's request-to-charge was taken from the pertinent provisions of the AICPA Statement of Auditing Standards No. 1, which state that an accountant "has no responsibility to apply *any* auditing procedures to unaudited financial statements" and that his obligations arise only if he "concludes *on the basis of facts known to him* that unaudited financial statements . . . are not in conformity to generally accepted accounting principles . . . ." §§ 516.02, 516.06 [emphasis added]. The court of appeals rejected this statement of an accountant's obligation and concluded that, under federal criminal law, the accountant's duty regarding unaudited statements may go "further," ultimately to be defined by a lay jury's "common understanding" of proper conduct. (Pet. App. 24a).[4]

Petitioner contends here, as he consistently has, that his obligations respecting the unaudited statement of

[4]The government implies that a PMM internal memorandum introduced at trial goes beyond the AICPA standards. (Br. in Opp., p. 13) The fact is, however, that petitioner satisfied the standards of his firm by examining NMSC records prior to concluding that he would not object to inclusion of Eastern figures in the unaudited statement. These records included the Eastern commitment letter, the time records of the account executive, and the detailed proposal NMSC had prepared for Eastern. See p. 23, *infra*. Nothing in the PMM internal memorandum purported to require the independent *verification* of unaudited data — the "next step" which the court below expressly held petitioner should have taken. (Pet. App. 22a-23a) In any event, the issue here is not the proper interpretation of PMM's memorandum, but whether an accountant following the authoritative AICPA statement of an accountant's obligations can nevertheless be convicted of a federal felony.

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earnings were those commanded by the authoritative professional pronouncements upon which the requested instruction was based. It is the court of appeals' express departure from those standards that petitioner asks this Court to review.

B. The government contends that the trial judge did not undertake to "formulate the governing standards" but properly left these for the jury to discern from expert testimony. (Br. in Opp., p. 11.) But the accountant's obligations when associated with unaudited statements involve a question of law, not a matter for an evidentiary contest among experts,[5] and in this case no expert testimony was offered.[6]

In any event the trial judge *did* purport to "formulate the governing standards" but in doing so referred only to an auditor's responsibilities. The judge then explained:

> Generally, as you have been told, in effect, a firm of public accountants, such as Peat, Marwick & Mitchell, *engaged to perform an independent audit* for a corporation such as NSMC, *represents and warrants* that it will perform the *audit* and other accounting work in accordance with generally accepted *auditing* and accounting principles, that it will *render an opinion based upon its audit*, for example, as to whether the financial statement of the company fairly presents its financial position and the results of its business operation. (Tr. 2367) [Emphasis added].

Thereafter, in explaining the meaning of financial statements, he added:

[5]The distinction between audited and unaudited statements has been consistently recognized in the lower federal courts *see, e.g., Fischer v. Kletz*, 266 F. Supp. 180 (S.D.N.Y. 1967); *Gold v. DCI, Inc.*, 1973 CCH Fed. Sec. L. Rep. ¶94,036 (S.D.N.Y. 1973) and the distinction is embodied in SEC Accounting Rule 2-02(e), 4 Fed. Sec. L. Rep. ¶68,128A (1976), which requires accountants to observe "appropriate professional standards" when associated with unaudited statements.

[6]The government offered no expert testimony on the

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> An *auditor must ascertain* that the financial statement in question, such as the figures or the footnote, *fairly presents the results of the operations and the financial position of the company*. (Tr. 2369) [Emphasis added].

But under the standards of the accounting profession this statement of an auditor's affirmative duties to inquire, to consider and to give his opinion was not relevant to petitioner's obligations respecting the *unaudited* figures reflecting the Eastern commitment. The repeated reference to the auditing function, without *any* counterbalancing instruction distinguishing the much more limited obligations attending association with unaudited statements, left the clear impression that the two kinds of obligations were the same.[7]

C. The government makes light of petitioner's contention that the decision below means that independent accountants will act at their peril if they

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(footnote continued from preceding page)
obligations of accountants associated with unaudited statements, and the six CPA's called by the defense (cited in Br. in Opp., p. 14 n.8) testified only as to factual matters. In asserting that testimony elicited by the defense on this point was insufficient, the government ignores the fact that the burden of proving a departure from accepted accounting standards falls upon the government, not petitioner.

[7]The trial judge refused petitioner's request for an instruction distinguishing unaudited statements, not because he considered the request improper, but because he thought he had already made the distinction "about 16 times." (Tr. 2384). The judge was mistaken. After reading the indictment, he referred to the unaudited character of the nine-month earnings statement only once:

> Perhaps the critical issue in this case, therefore, can be summarized as follows: Were the quoted earnings figures and footnote set forth in Count 2 fairly set out? That is to say, did they fairly present the revenue and earnings picture for NSMC for the fiscal year 1968 and the first nine months unaudited of fiscal 1969? (Tr. 2369).

(continued)

continue to observe the distinction between audited and unaudited statements embodied in professional standards and the SEC rules. (Br. in Opp., p. 14). Yet it is difficult to see how any other effect can follow from a decision that permits lay jurors, who are instructed only on an auditor's responsibilities, to conclude from their "common understanding" that an accountant should have conducted independent verification – an auditing procedure – when associated with unaudited figures the jurors deem "suspicious". Indeed, the American Institute of Certified Public Accountants (AICPA) has filed an *amicus curiae* brief with this Court urging review because of the consequences the accounting profession itself sees as flowing from the decision below.

The auditor's distinct obligations in connection with the opinion he must render are reflected, as this Court has recently observed, in express language of the SEC rules. *Ernst & Ernst v. Hochfelder*, ____ U.S. ____ (No. 74-1042, March 30, 1976) slip op. at 1-2 n.1. The same SEC rule that defines the content of the auditor's report and opinion expressly distinguishes association with unaudited financial statements and as to these simply directs the accountant to observe "appropriate professional standards." *See* Accounting Rule 2-02(e), as amended September 10, 1975, 4 Fed. Sec. L. Rep. ¶69,128A (1976).[8] The holding of the court of appeals that an accountant like petitioner can properly be convicted of a felony for failure to confirm figures

(footnote continued from preceding page)
This summary followed the passage quoted in the text which focused exclusively upon the *auditor's* function, and suggested that the accountant was under identical obligations as to both the audited and unaudited figures.

[8] Subsections (b) and (c) of Accounting Rule 2-02, 4 Fed. Sec. L. Rep. ¶69, 127-69, 128 (1976), which concern the *auditor's* report and opinion, are identical to the subsections (i)(2) and (3) of current Rule 17a-5, 3 Fed. Sec. L. Rep. ¶26,982 (1976), which this Court cited in *Hochfelder*.

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appearing in unaudited statements marks an unforeshadowed departure from those governing professional standards adopted by the SEC's own rules and should be reviewed by this Court.

II.

THE DECISION BELOW SIGNIFICANTLY WEAKENS THE SCIENTER REQUIREMENT UNDER SECTION 32(a) OF THE SECURITIES EXCHANGE ACT.

A. We argued in the petition that conviction for knowingly and willfully filing a false financial statement ordinarily requires a finding that the defendant actually knew of the falsehood alleged. We also took note of authority in some courts of appeals that knowledge may be imputed to a defendant actually ignorant of the facts, but only where he acted with a *conscious purpose* to avoid enlightenment. In a recent *en banc* decision the Court of Appeals for the Ninth Circuit divided on the question whether knowledge may *ever* be imputed to a defendant charged under a statute punishing "knowing" conduct. *United States v. Jewell*, ____ F.2d ____ (9th Cir. No. 74-2832, February 27, 1976) (*en banc*).[9] A majority of the court concluded that a defendant might be treated as having actual knowledge if it were found that, notwithstanding his ignorance, he had "deliberately avoided positive knowledge . . . to avoid responsi-

[9]The offenses charged were "knowing" importation of a controlled substance, 21 U.S.C. §952(a), and "knowing" possession with intent to distribute, 21 U.S.C. §841(a)(1).

bility in the event of discovery."[10] *United States v. Jewell, supra,* slip op. at 3. The four dissenting judges believed that nothing short of actual knowledge would support conviction. Slip op. at 17-19. Petitioner, however, was convicted on a theory of reckless omission that no federal court has previously found equivalent to "knowing" and "willful" conduct.[11] The court of appeals sustained his conviction by holding that a professional duty to inquire existed, even as to unaudited figures, and that the breach of this duty was tantamount to knowledge.

B. The government contends that the instructions "left no room for a conviction except on a finding that

[10]The court reviewed various formulations of the concept of ignorance contrived for the very purpose of avoiding criminal responsibility. As the court noted, the requirement of a "conscious purpose to avoid learning the truth" has been the most common formulation. Slip op. at 7-9 & nn.12-13. As noted in the petition (Pet. 30-32 & n.18), this has been the uniform interpretation of other federal statutes proscribing "knowing" conduct. This Court has captured the same notion in its observation that one who practices a "studied ignorance" is not entitled to claim lack of knowledge. *Turner v. United States,* 396 U.S. 398, 417 & n.34 (1970), *citing Griego v. United States,* 298 F.2d 845, 849 (10th Cir. 1962) (adopting "conscious purpose" language).

[11]The government suggests that, in objecting to the charge on knowledge and intent, petitioner is asking for *sua sponte* action by the trial judge because of counsel's failure specifically to request inclusion of the "conscious purpose" language. (Br. in Opp., p. 18). During the conference between counsel and the trial judge on requests to charge, the judge indicated that he would include language on recklessness, as the government requested. Petitioner's counsel objected, arguing that the evidence did not support a recklessness charge. The judge dismissed his objection, saying his instructions would permit the government

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petitioner intentionally made false statements in the financial reports." (Br. in Opp., p. 16). This attempt to avoid the recklessness issue must fail because it is contrary to the demonstrable understanding of the jury, contrary to express acknowledgment of the trial judge who gave the charge, and contrary to the reading of it adopted by the appellate judges who affirmed the conviction.

Although, as the government notes, the words "willfully" and "knowingly" were frequently repeated in the charge (Br. in Opp., pp. 16-17), these words were defined in a discrete portion of the charge, in which the jury was told that it could convict petitioner if it found that he acted with reckless indifference to truth or falsity. (Tr. 2364-2365).

After the initial period of deliberation, the jury requested additional instruction on the definition of "wilful [sic] and knowingly." (Tr. 2400). In responding

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to argue that petitioner "should have been very skeptical about the [Eastern Airlines] contract." (Tr. 2139). Petitioner's counsel renewed his objection to the charge on recklessness after the jury retired (Tr. 2383) and again when recklessness was reintroduced in the second supplementary charge (Tr. 2428).

The nature of counsel's objection was clear to the trial judge, as indicated by his remark in overruling it, and under these circumstances counsel's conduct was adequate to preserve objections for appellate review. In any case, it is settled law that the failure to instruct the jury properly on the elements of intent and knowledge constitutes plain error. *See, e.g., United States v. Vitiello*, 363 F.2d 240, 243 (3rd Cir. 1966); *United States v. Alsondo*, 486 F.2d 1339, 1344 (2d Cir. 1973), *rev'd on other grounds sub nom. United States v. Feola*, 420 U.S. 671 (1975).

Most critically, the court below obviously found petitioner's objections to the charge properly before it and passed on them. (Pet. App. 20a-23a).

to that request the trial judge omitted any reference to recklessness as a basis for conviction, despite objection by the government. (Tr. 2400-2401). After another period of deliberations, the jury reported deadlock. (Tr. 2420).

The judge instructed the jury to continue deliberations and at the jury's second request again defined the requisite state of mind for conviction, but on this occasion the judge returned to the formulation of recklessness used at the close of all the evidence. (Tr. 2426-2427). Shortly thereafter the jury returned its verdict.

In discussing the concept of recklessness the judge charged that the jury could convict if it found that petitioner had "deliberately closed his eyes to the obvious or to facts that certainly would be observed or ascertained in the course of his accounting work . . . ." (Tr. 2427). Reintroduced after its omission in the first supplementary charge, this language permitted the jury to impute to petitioner the knowledge of facts that "would be" observed in the course of accounting work and to convict if it found a "reckless" failure to ascertain the truth. This interpretation was reinforced by the judge's concluding admonition that "*ordinary* or *simple* negligence *alone* would be insufficient" (Tr. 2427, emphasis added). This was the last language the jury heard before delivering its verdict. These instructions left the clear impression that the jury could convict upon finding a grossly negligent or reckless failure to make further inquiry.[12]

[12]This interpretation was intended by the trial judge, for at the conference with counsel on requests to charge, the judge stated, in response to objection to recklessness language, that his charge would permit the government to argue that petitioner "should have been very skeptical about the [Eastern] contract." (Tr. 2139).

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Clearly, the only realistic interpretation of the jury's conduct is that agreement on the requisite mental state—a matter that had obviously been a troublesome point from the beginning of deliberations—became possible only when the *second* supplementary instructions removed the need for a finding of actual knowledge, a finding that all jurors had been unable to make when told in the *first* supplementary charge that only actual knowledge would justify conviction.

Indeed, the trial judge expressly acknowledged the impact of his instructions on recklessness. At sentencing the judge expressed his belief that petitioner had been sincere in denying he had knowingly violated the law, but he added:

> "[T]he tragedy is that the jury found that this was an audit or audits done with reckless disregard for what was really involved. We know that because of the record showing what it did in the jury deliberation." (S. Tr. 12).

The trial judge thus appreciated that he had allowed the jury to return the conviction on the basis of a finding that the petitioner had recklessly failed to realize "what was really involved," and that this was all the jury

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The charge in *United States v. Simon*, 425 F.2d 796 (2d Cir. 1969), *cert. denied* 397 U.S. 1006 (1970), cited by the government (Br. in Opp., p. 16 n.9) included the express admonition on three separate occasions that the jury must find knowing concealment with "intent to defraud" in order to convict. (*Simon* Tr. 4017, 4028-29, 4045). In arguing that the charge to petitioner's jury was "adapted almost verbatim" from that in *Simon*, the government neglects to point out that this key language from the *Simon* charge was not given.

had actually found, not that petitioner had actually known, or had consciously avoided learning, the true facts.

In view of this record, it is no surprise that the court of appeals considered petitioner's objections to the "recklessness" charge on the merits. The court flatly held that the conviction was proper without a finding of actual knowledge or a conscious purpose to remain ignorant. It did so because of its theory that petitioner had recklessly breached a purported duty of inquiry with respect to unaudited financial statements. (Pet. App. 16a-17a; 22a).

C. There is simply no escaping the fact that the decision below breaks new ground in dispensing with the *scienter* requirement heretofore embodied in the proscription of "knowing" and "willful" conduct. Petitioner is not simply calling into question "some of the language in the court of appeals' opinion" (Br. in Opp., p. 16). The court expressly held, in rejecting petitioner's challenge to the recklessness charge, that an accountant could be convicted of a felony for reckless conduct absent a conscious purpose to avoid learning the truth, as is required when others are prosecuted for "knowing" and "willful" conduct. The court held that a different standard was proper for members of the "ancient professions [law and accounting]" because they are under a "duty to discover the true facts." (Pet. App. 21a-22a). But as this Court has only recently noted, the imposition of sanctions for breach of a duty to inquire amounts to a negligence standard of criminal responsibility. *See United States* v. *Park*, 421 U.S. 658, 670-73, (1975). It is undeniable, therefore, that the court below has broken new and dangerous ground by criminalizing the failure to abide by a newly created "duty" to apply auditing procedures to unaudited figures.

In holding recently that § 10(b) of the Securities Exchange Act does not authorize an award of *civil* damages against an accountant unless an intent to deceive is proved, this Court drew attention to the precision with which Congress has specified the requisite state of mind accompanying each of the sanctions prescribed by the securities laws and emphasized the necessity of heeding the language of each statutory provision imposing liability. *Ernst & Ernst v. Hochfelder*, ____ U.S. ____ (No. 74-1042, March 30, 1976). As the Court noted there, while some sections of the 1933 Act impose civil liability upon accountants for negligent or innocent misrepresentation, § 18 of the 1934 Act, which imposes civil liability upon "any person who shall make or cause to be made" a materially false or misleading statement in any "application, report, or document filed pursuant to this title or any rule or regulation thereunder," requires more than negligence. Slip op. at 13-14, 24-25 n.31. The Court's discussion there of the language finally chosen by Congress showed that, in recognizing a defense based on "lack of knowledge" of falsity, Congress had rejected a standard that would have imposed *civil* liability on an accountant unless he had "no ground to believe that such statement was false or misleading." Because Congress appears to have insisted that only actual knowledge will justify imposing civil liability on accountants, the Court refused to suggest that even "recklessness" would be enough for *civil* liability. Slip op. at 7, n.12.

The Court's treatment of § 18 is particularly pertinent here because the language of that section defining proscribed conduct is virtually identical to the provisions of § 32(a) under which petitioner was charged. Yet in imposing criminal sanctions under

§ 32(a) Congress required a finding of *knowing* and *willful* submission of a false statement. It is simply inconveivable that in choosing this language Congress meant to make negligent or even reckless ignorance a federal felony when it simultaneously made "lack of knowledge" a complete defense to civil liability for the same conduct.

Moreover, as the Court noted in *Hochfelder*, Congress had no difficulty in spelling out with precision those instances in which it wished to impose a special standard of *civil* liability upon "experts," including accountants. To read § 32(a), a criminal statute addressed to "any person", as imposing a different standard of responsibility for accountants and lawyers—the express construction given it by the court below—is simply to disregard the "interrelated components" of the securities laws, as well as the language of § 32(a) itself. Slip op. at 20.

In proscribing knowing and willful conduct under § 32(a), Congress used words that this Court has consistently construed to embody "the central thought that wrongdoing must be conscious to be criminal." *Morrisette* v. *United States*, 342 U.S. 246, 252 (1952). In permitting petitioner to be convicted for failure to challenge "suspicious" figures, the court of appeals imposed criminal liability for "neglect where the law requires care, or inaction where it imposes a duty"—a standard of liability which this Court has always distinguished from that demanded by a proscription of knowing and willful conduct. *United States* v. *Park*, 421 U.S. at 671, *quoting Morisette*, *supra* v. *United States*, 342 U.S. at 255. Unless the Court is willing to acquiesce in this expansion of criminal liability under the securities laws, it must grant certiorari.

III.

THIS CASE PRESENTS AN IMPORTANT ISSUE OF SOUND JUDICIAL ADMINISTRATION TO ASSURE UNANIMOUS VERDICTS.

The government echoes the position taken by the court below in arguing that it may be "better practice" to instruct a jury that it must be unanimous as to which specification of a multi-specification count (if any) justifies conviction, but the government insists that this instruction is not Constitutionally compelled. That position fails to accord proper respect to the Constitutional guarantee of unanimity.

The issue here is closely related to the doctrine articulated in *Stromberg* v. *California*, 283 U.S. 359 (1931), that where a jury receives a case under alternative theories, one of which will legally support a conviction and one of which will not, the conviction cannot stand. This basic principle has been applied in many contexts.[13] As Mr. Justice White recently observed in his concurring opinion in *United States* v. *Gaddis*, ____ U.S. ____, ____ (No. 74-1141, March 3, 1976), slip op. at 2, the vice in such cases is that it is "impossible to know whether a properly instructed jury would have convicted the defendant of anything."

So too in the present case the jury was told that if it found the proxy statement false "in either one of" the two respects alleged in the indictment–which were

[13]*See, e.g., Street v. New York*, 394 U.S. 576, 585-86 (1969); *Williams v. North Carolina*, 317 U.S. 287, 292 (1942); *Vitello v. United States*, 425 F.2d 416, 419 (9th Cir. 1970); *United States v. Guterma*, 281 F.2d 742, 747-48 (2d Cir. 1960).

totally distinct and unrelated specifications of falsity "that is sufficient to support a conviction" (Tr. 2340). Petitioner, however, had a Constitutional right, reinforced by Rule 31(a) of the Federal Rules of Criminal Procedure, not to be convicted unless twelve jurors unanimously found against him on all of the facts necessary to support the government's charge. It places too much strain on the jury's ability to perform mental gymnastics to assume, as the government argues and as the court below held, that the jury "must" have understood the statement forty pages later that "your verdict must be unanimous" (Tr. 2380), as applying to the factual underpinnings as well as to the ultimate "verdict." Because the district judge refused to give the requested instruction that all jurors had to agree on at least one specification before they could convict, there is real danger than the jury did not unanimously find against petitioner on any particular state of facts. It is simply impossible to know.

The practice of joining multiple specifications of facts in a single count is not at all uncommon. The court below termed the objectionable instructions here those "generally given" in that circuit and held unnecessary any clarification in the future. The propriety of refusing to give instructions of the type sought here thus raises an important issue of the proper administration of criminal justice.

IV.

THE VENUE QUESTION MERITS REVIEW

The government's attempt to sustain venue in this case dramatically illustrates why the Court should take

this opportunity to provide much needed clarification of this cloudy area. The lower courts have struggled to understand the proper reach of *Travis* v. *United States*, 364 U.S. 631 (1961), and the government has come up with an ingenious approach to support the venue it selected in the present case without defending the decision by the court below that *Travis* should be regarded as "confined to the facts" in that case. (Pet. App. 30a).[14] There is no such easy way out.

Although the government attempts to distinguish the holding of the D.C. Circuit in the *Investors Funding* case,[15] it is undeniable that the court of appeals there regarded *Travis* as applying to the very venue provision at issue in the present case, § 27 of the Securities Exchange Act, 15 U.S.C. § 78aa, and as making venue proper in the District of Columbia, where a document was to have been filed with the Securities and Exchange Commission.

For the same reason, the fact that the proxy material was printed in the Southern District of New York does not suffice to lay venue there. Although the government invokes the "continuing offense" principle, that venue statute, 18 U.S.C. § 3237, is only operative "[e]xcept as otherwise expressly provided by enactment of Congress. . . ." In addition to the fact that

[14] It is certainly not true that the lower courts have refused to apply *Travis* to other factual situations. See, *e.g.*, in addition to the cases cited in this section, *United States v. Walden*, 464 F.2d 1015, 1018-19 (4th Cir.), *cert. denied*, 409 U.S. 867 (1972) (bank burglary); *United States v. Sweig*, 316 F. Supp. 1148, 1159-61 (S.D. N.Y. 1970) (conflict of interest in SEC matter).

[15] *Investors Funding Corp. v. Jones*, 495 F.2d 1000 (D.C. Cir. 1974).

Travis rejected the application of the "continuing offense" theory to a false-filing charge, there *is* a special venue statute that controls here, § 27 of the Securities Exchange Act, permitting venue in criminal cases only where the act or transaction "constituting the violation occurred." In *Pratt* v. *First California Co.*, 517 F.2d 11, 12-13 (10th Cir. 1975), the Tenth Circuit recently followed *Investors Funding* to hold that § 27 is an explicit venue statute that precludes application of other venue theories under § 3237. Significantly, none of the cases cited by the government invoking the "continuing offense" principle was covered by a special venue provision such as the one applicable to securities cases.

Furthermore, in accordance with the reasoning of *Travis*, lower courts have held that a false-filing violation occurs only where the filing takes place, not where preparatory conduct took place.[16] To the extent there is disagreement on this point, there is all the more reason for review by this Court.

The government's attempt to distinguish *Travis* by suggesting "jurisdictional" differences between the NLRB and the SEC does not reconcile the authorities

[16]*See, e.g., United States v. Valenti*, 207 F.2d 242, 243-45 (3d Cir. 1953) (NLRB); *United States v. Mischlich*, 310 F.Supp. 669, 671 (D. N.J. 1970), *aff'd sub nom. United States v. Pappas*, 445 F.2d 1194 (3d Cir.), *cert. denied*, 404 U.S. 984 (1971) (SBA).

The government cites *United States v. Bithoney*, 472 F.2d 16, 21-25 (2d Cir.), *cert. denied*, 412 U.S. 938 (1973), to sustain venue here. But the court there applied *Travis* to a statute punishing the "making" of a false statement in a petition required or authorized by the immigration laws, and held that for venue purposes the crime occurred where the document was filed, not where it was prepared and signed.

in this area. Moreover, the parallel between the statutory systems in *Travis* and in the present case cannot be so easily blinked. In this case, as in *Travis*, the criminal statute actually invoked was designed to keep a federal agency from acting on the basis of false information submitted to it,[15] and, as in *Travis*, there was no direct obligation to file the material. It follows that if any offense took place under the statute which petitioner was charged with violating, it took place only when and where the proxy statement was actually filed. If there is doubt about the current vitality and scope of *Travis*, it is for this Court to resolve.

V.

THE GOVERNMENT WITHHELD CRUCIAL FACTS FROM AND MADE AFFIRMATIVE MISREPRESENTATIONS TO THE JURY

The government flatly denies our contentions that the prosecutor misstated crucial facts to the jury. Yet the record shows at least two key statements in the prosecutor's summation that are directly contradicted by Randell's subsequent testimony as a government witness at the trial of Thomas Mullen. Compounding this error, the government continues to justify the conviction here by arguing that petitioner failed to respond properly to what are termed "extraordinarily suspicious" circumstances (Br. in Opp., p. 15). This is precisely our point: the true facts, unlike those portrayed to the jury and the court of appeals, are not so "suspicious" at all.

Summing up at petitioner's trial, the prosecutor stated:

> . . . [T]hey are printing up this very proxy statement, there's going to be a big hole in the

[17]We reiterate that this is a false filing case, not a case where the circulation of fraudulent proxy material to shareholders was the offense charged.

> earnings because *the Pontiac contract has to come out.*
>
> By magic 3 o'clock in the morning *the first time it is mentioned* the Eastern Airlines contract comes up. (Tr. 2295) [Emphasis added].

The prosecutor thus told the jury that petitioner had first told Randell his objection to the Pontiac contract on the night the proxy statement was being printed, and that Randell had immediately suggested replacement with the Eastern contract. Both statements are contradicted by Randell's subsequent testimony at the Mullen trial. As Randell testified there, petitioner told him some time before the evening at the printer that he would object to inclusion of Pontiac figures in financial statements, and on learning this Randell asked his account executives whether there were any other contracts for which commitment letters had been or could be obtained (Mullen Tr. 46).

Referring to the Eastern contract at petitioner's trial, the prosecutor stated:

> It is supposed to be a contract for the period which ended two months before and yet in the two months between May and August, nobody seems to have peeped a word [about] it to the controller of National Student Marketing *or anybody else who had any business with this matter.* (Tr. 2295-2296) [Emphasis added].[18]

[18]Since Natelli had advised the company in December 1968 that in the future income should not be recorded on client commitments until a written commitment letter was received (Tr. 530, 673), there was no significance to the fact that the financial officers of the company, who had their offices in Washington, were not told of the earlier oral commitment from Eastern by the account executives in New York, who were working on the Eastern account.

Nor was it ground for "suspicion" that prior to August 14, 1969 there was no record of expenditures on the Eastern contract or

(continued)

This assertion that no responsible person at NSMC had any contact with the Eastern commitment between May and August was contradicted by Randell's later testimony about his conversation with Dennis Kelly, NSMC's Vice President in charge of sales, immediately after petitioner first objected to the Pontiac commitment:

> He [Kelly] said he had been working on a contract with Eastern for a number of months and he felt as though it was at the point that he could get a commitment letter on that. He didn't know but he would see if he could.
>
> * * *
>
> Q. Did Kelly say anything else to . . .
>
> A. Yes, he said Bob had been working with Tom [Mullen of Eastern Airlines] for a number of months.
>
> Q. Bob who?
>
> A. Bob Bushnell [an NSMC Vice-President in charge of the Eastern account].
> (Mullen Tr. 46-47)

Thus, the Eastern commitment was not, as the prosecutor asserted, something unknown to anyone at NSMC between May and August. Rather, it was a commitment which the Vice-President in charge of sales and the Vice-President in charge of the Eastern account had been working on throughout the period, and which

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(footnote continued from preceding page)

billing to Eastern, since that was consistent with the percentage-of-completion accounting employed by NSMC. This method of accounting was adopted because it was not possible to segregate the overhead and other expenses attributable to the creative efforts expended in developing programs for prospective clients prior to the time the client committed itself to the program. *See* Pet. 6-7.

Kelly believed he could reduce to a commitment letter in the form necessary to support the accrual of income.

The government blithely asserts that Randell's testimony "in no way bears on petitioner's state of mind" (Br. in Opp., p. 29). On the contrary, the prosecutor's statements in summation concerned what petitioner did and what "facts" had confronted him—matters of the utmost relevance to the inferences the prosecutor asked the jury to draw about petitioner's culpability. Randell's later testimony contradicts the prosecutor on these key points and indeed tends to corroborate petitioner's testimony that Randell told him prior to the meeting at the printer that NSMC was expecting a commitment letter from Eastern (Tr. 1913-14).

The government's assertions about the Eastern contract at petitioner's trial misled not only the jury, but had discernable impact upon the court of appeals, which wrote that "the Eastern contract was a matter for deep suspicion because it was substituted so rapidly for the Pontiac contract . . ." (Pet. App., p. 15a).

The complete account, including Randell's later testimony, places the Eastern commitment in a critically different context. Prior to the meeting at the printer, petitioner had told Randell that the Pontiac letter was not in the proper form to justify the accrual of revenue. After talking to Kelly and learning that an oral commitment from Eastern could be reduced to writing, Randell told petitioner that the company was expecting a letter from Eastern confirming an earlier oral commitment. When Randell brought up the Eastern commitment at the printer again, therefore, it was neither a sudden appearance nor a matter for suspicion. Even so, petitioner did not make any decision concerning the

Eastern commitment until the following week, after examining the commitment letter itself, reviewing the detailed proposal brochure NSMC had submitted to Eastern in May, discussing the matter with NSMC's Vice-President in charge of sales, and reviewing Bushnell's time records which showed an expenditure of more than 110 hours on this project prior to the end of May.[19]

The misstatements in the summation as to the "magical" Eastern commitment, which allegedly sprang to life full blown at 3:00 A.M. at the printer, were not simply the result of a slip of the tongue in the heat of argument. Rather, this was a theme of the government's presentation throughout the trial, starting with a similar assertion in the prosecutor's opening statement (Tr. 55-56), developed further during the examination of the government's witnesses (Tr. 257-259, 653-655), and highlighted in the cross-examination of petitioner himself. (Tr. 2047-2048). Having reiterated this theme throughout the case, the prosecutor twice in his summation referred to the appearance of the Eastern commitment letter as "magical" and three times stressed that this occurred at "3:00 o'clock in the morning" (Tr. 2268-2269, 2295, 2296).

[19]As Randell's subsequent testimony makes quite clear, there was never the kind of single transaction "substitution" of Eastern for Pontiac, as the government argued. While Randell had proposed at the printer to "substitute" Eastern for Pontiac without changing the figures in the unaudited statement, petitioner unrequivocally rejected this suggestion. Only after examining company documents several days later did petitioner make the separate decision that he would not object to inclusion of the Eastern figures. It was Randell's suggestion not to bother recomputing the figures, which petitioner rejected, that petitioner had called "wierd"; this was not, as the government successfully argued to the court below, petitioner's characterization of the Eastern commitment or its ultimate inclusion in the unaudited financials. (Pet. 17-18 n.9).

The government now suggests that any misstatement of the facts was inadvertent. That claim must be judged against the fact that prior to this trial Randell had pleaded guilty and testified before the grand jury in the Mullen case. Yet the government did not call him to testify here, even though without his testimony there was no proof the Eastern commitment was, in fact, "phony" as the government counsel argued.[20]

But even if the misstatements contained in the government's opening statement and summation were inadvertent, there can be no question that the jury was seriously misled by the government's statements concerning one of the most crucial events at issue and the event that led the court below to conclude that the figures confronting petitioner were "suspicious." In such circumstances summary reversal is required even if the government's counsel did not knowingly misrepresent the facts. *United States* v. *Ott*, 489 F.2d 872, 974-75 (7th Cir. 1973) (Stevens, J.).

While the government urges this Court to overlook these circumstances and leave petitioner to pursue them in collateral proceedings, this Court has unquestioned power to make its own determination, or to remand the case for further proceedings on this point. *See Ring* v. *United States*, 419 U.S. 18 (1974).

[20]Randell's testimony would have shown that in order to obtain the type of letter from Eastern the accountants required, he had to give Mullen a side letter making the commitment cancellable at any time and that Randell deliberately kept the existence of this side letter a secret from petitioner (Mullen Tr. 53-54). Moreover, Randell's testimony would have revealed that he had concealed from petitioner the fact that Mullen had no authority to commit Eastern to purchase NSMC's services. Given the government's suppression of that fact, it is not entitled to rely upon it here. (Br. in Opp., p. 29).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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April 9, 1976

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